


UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

FEB 22 2018

CLERK, U.S. DISTRICT COURT,
WESTERN DISTRICT OF TEXAS
BY  DEPUTY CLERK

BRADLEY ALVERSON and CASEY
HOWIE, individually and on behalf of
all others similarly situated

Plaintiffs

v.

BL RESTAURANT OPERATIONS LLC
d/b/a BAR LOUIE

Defendant

CIVIL NO. SA-16-CA-849-OG

ORDER

On this date, the Court considered the report and recommendation of United States Magistrate Judge John W. Primomo, filed in the above-styled and numbered cause on August 8, 2017 (Dkt. # 39). Defendant filed objections (Dkt. # 43, 46) and Plaintiffs responded to the objections (Dkt. # 45).

Defendant contends the Court should reject the Magistrate Judge's well-reasoned recommendation based on the recent holding in *Marsh v. J. Alexander's, LLC*, 869 F.3d 1108 (9th Cir. 2017). However, *Marsh* was a 2-1 decision and the Ninth Circuit has granted rehearing en banc. *Marsh v. J. Alexander's LLC*, 2018 WL 913130 (February 16, 2018). In the absence of controlling Fifth Circuit authority, the Eighth Circuit holding in *Fast v. Applebee's Intern., Inc.*, 638 F.3d 872, 878 (8th Cir. 2011) is persuasive, and numerous other federal courts have followed the same logic. See, e.g., *Romero v. Top-Tier Colorado LLC*, 849 F.3d 1281, 1284 (10th Cir. 2017); *Driver v. AppleIllinois, LLC*, 739 F.3d 1073, 1075 (7th Cir. 2014); *Plewinski v. Luby's Inc.*, 2010 WL 1610121, at *5 (S.D. Tex. Apr. 21, 2010); *Flood v. Carlson Restaurants, Inc.*, 94

F.Supp.3d 572, 584 (S.D.N.Y. 2015)(listing cases).

After conducting an independent review of the record and the applicable law, the Court concludes that the Magistrate Judge's recommendation should be accepted.

It is therefore ORDERED that the Magistrate Judge's recommendation (Dkt. # 39) is ACCEPTED and Defendant's motion for partial judgment on the pleadings (Dkt. # 24, 29) is DENIED for the reasons stated in the recommendation.

SIGNED and ENTERED on the 22 day of February, 2018.



ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE